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May 8, 2007

No. 06-9130

IN THE SUPREME COURT OF THE UNITED STATES

ABDUS-SHAHID M.S. ALI, PETITIONER

v.

FEDERAL BUREAU OF PRISONS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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The United States has acquiesced to the Court granting review of this case. It agrees (1) that "there is a conflict in the circuits" over the question presented; (2) that the conflict "is highly unlikely to be resolved without this Court's intervention;" (3) that the question presented "is a recurring one of importance;"[1] and (4) that the court of appeals' "definitive" resolution of the

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[1] The United States has conceded elsewhere that the question presented is "of exceptional importance." U.S. Pet. for Rhr'g En Banc at 1, Dahler v. United States, 473 F.3d 769 (CA7 2007) (No. 05-4782) (emphasis added); accord, U.S. Pet. for Rhr'g & Rhr'g En Banc at 2, Andrews v. United States, 441 F.3d 220 (CA4 2006) (No. 04-7269). As the United States acknowledges, both the Fourth and Seventh Circuits denied these petitions for rehearing en banc. U.S. Br. 9.

question "weighs in favor of granting review" "despite the interlocutory posture of this case." U.S. Br. 6, 9, 10, 12, 13.

Although it has acquiesced to review, the United States nonetheless posits that "other opportunities for review that do not involve interlocutory decisions are likely to arise in short order" and that "the Court may prefer to await a case that does not arise in an interlocutory posture." Id. at 13. Of course, the United States does not recommend such a course of action, and petitioner anticipates that the Court will grant the petition in any event. In an abundance of caution, however, petitioner submits this brief reply to dispute both (a) the existence of any reason to "await a case that does not arise in an interlocutory posture," and (b) the accuracy of the assertion that "other opportunities for review that do not involve interlocutory decisions are likely to arise in short order."

It is axiomatic that "the interlocutory status of [a] case may be no impediment to certiorari, where the opinion of the court below has decided an important issue, otherwise worthy of review." Robert L. Stern et al., Supreme Court Practice § 4.18, at 260 (8th ed. 2002). In fact, of the 71 signed opinions that the Court will have

issued this Term, 20 (or over 28%) will have reviewed interlocutory judgments of the courts of appeals.[2]

There is no dispute that this case presents an important and recurring issue "otherwise worthy of review." See U.S Br. 10 (acknowledging that "[r]estoring uniformity and stability to the interpretation and operation of a federal law is an established basis for this Court * * * to grant the petition"); see also Pet. 10 ("Resolution of this conflict [among the circuits] is warranted in view of the critical interests involved in FTCA litigation, the

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[2] Bell Atlantic Corp. v. Twombly, No. 05-1126 (argued Nov. 27, 2006); Claiborne v. United States, No. 06-5618 (argued Feb. 20, 2007); Credit Suisse First Boston Ltd. v. Billing, No. 05-1157 (argued Mar. 27, 2007); Global Crossing Telecomm., Inc. v. Metrophones Telecomm., Inc., 127 S. Ct. 1513 (2007); Hein v. Freedom from Religion Found., Inc., No. 06-157 (argued Feb. 28, 2007); KSR Int'l Co. v. Teleflex Inc., --- S. Ct. ---, 2007 WL 1237837 (April 30, 2007); Long Island Care at Home, Ltd. v. Coke, No. 06-593 (argued April 16, 2007); Morse v. Frederick, No. 06-278 (argued March 19, 2007); Office of Senator Mark Dayton v. Hansen, No. 06-618 (argued April 24, 2007); Osborn v. Haley, 127 S. Ct. 881 (2007); Permanent Mission of India to the United Nations v. City of New York, No. 06-134 (argued April 24, 2007); Safeco Ins. Co. of Am. v. Burr, No. 06-84 (argued Jan. 16, 2007); Schriro v. Landrigan, No. 05-1575 (argued Jan. 9, 2007); Scott v. Harris, --- S. Ct. ---, 2007 WL 1237851 (April 30, 2007); Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 127 S. Ct. 1184 (2007); Tellabs, Inc. v. Makor Issues & Rights, Ltd., No. 06-484 (argued March 28, 2007); United States v. Atlantic Research Corp., No. 06-562 (argued April 23, 2007); Watson v. Phillip Morris Companies, Inc., No. 05-1284 (argued April 25, 2007); Wilkie v. Robbins, No. 06-219 (argued March 19, 2007); Winkelman v. Parma City Sch. Dist., No. 05-983 (argued Feb. 27, 2007).

recurring nature of the question presented, and the need to ensure the FTCA's uniform application."). Moreover, the concerns typically associated with interlocutory petitions - e.g., that the issue of law presented will be either sharpened by factual elaboration or rendered moot through further proceedings - are not present here. The parties agree that "whatever the ultimate disposition" of petitioner's other claims presently pending on remand before the district court, that disposition "will not affect petitioner's FTCA claim, which the court of appeals has definitively rejected as a matter of law." U.S. Br. 12-13; see also Pet. 25-26 (noting that petitioner's other claims "will not affect the issues before the Court").

Although it agrees that the interlocutory posture of this case presents no obstacle to resolution of the question presented, the United States suggests that the Court may prefer to await another case because "other opportunities for review that do not involve interlocutory decisions are likely to arise in short order." U.S. Br. 13. The accuracy of this speculative premise, however, is far from clear.

Unlike district courts, which confront the question presented with remarkable frequency,[3] the courts of appeals confronted the question only five times between January 1, 2006, and the filing of this reply.[4] See Pet. App. 1a-7a;

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[3] Between January 1, 2006, and the filing of this reply, district courts addressed the question presented in twenty-four decisions available on Westlaw (and likely many more that are not library-accessible, see Pet. 15). See Cyrus v. Doe, No. 3:06-CV-01697, 2007 WL 916300, at *5 (M.D. Pa. Mar. 21, 2007); Webber v. Ramos, No. EP-04-CA-426-KC, 2007 WL 1039214, at *4 (W.D. Tex. Mar. 21, 2007); Gordon v. United States, No. 2:05-cv-1011, 2007 WL 710231, at *2-*3 (S.D. Ohio Mar. 6, 2007); VanZandt v. Fish & Wildlife Serv., No. 05-CV-6093 CJS, 2007 WL 670959, at *4-*6 (W.D.N.Y. Feb. 28, 2007); Amadi v. Robinson, No. 2:06-cv-01833-JTT, 2007 WL 958148, at *5 (W.D. La. Feb. 16, 2007); Futch v. Drug Enforcement Admin., No. CV406-238, 2007 WL 496631, at *1 & n.2 (S.D. Ga. Feb. 12, 2007); Cross v. United States, No. 5:06-cv-36-DCB-MTP, 2007 WL 763926, at *1-*2 (S.D. Miss. Feb. 12, 2007); Macia v. United States, No. 3:06cv185/RV/MD, 2007 WL 187480, at *5 (N.D. Fla. Jan. 22, 2007); Pet. 15-16 n.12 (collecting sixteen examples from 2006).

[4] One likely explanation for this disparity is the fact that each of the ten circuits to have addressed the issue (save the Fourth Circuit) solidified its respective position years ago. Compare United States v. Lockheed L-188 Aircraft, 656 F.2d 390, 397 (CA9 1979); United States v. 2,116 Boxes of Boned Beef, 726 F.2d 1481, 1491 (CA10), cert. denied, 469 U.S. 825 (1984); Ysasi v. Rivkind, 856 F.2d 1520, 1525 (CAFC 1988); Schlaebitz v. Department of Justice, 924 F.2d 193, 195 (CA11 1991) (per curiam); Cheney v. United States, 972 F.2d 247, 248 (CA8 1992) (per curiam); Halverson v. United States, 972 F.2d 654, 656 (CA5 1992) (per curiam), cert. denied, 507 U.S. 925 (1993); Kurinsky v. United States, 33 F.3d 594, 598 (CA6 1994), cert. denied, 514 U.S. 1082 (1995); Bazuaye v. United States, 83 F.3d 482, 483 (CADC 1996); Ortloff v. United States, 335 F.3d 652, 659-60 (CA7 2003), cert. denied, 540 U.S. 1225 (2004), with Andrews, supra. Accordingly, district courts within those circuits can resolve the issue

Bruscino v. Pugh, No. 06-1182, 2007 WL 1140361, at *1-*2 (CA10 Apr. 18, 2007); Robinson-Bey v. Feketee, No. 06-3326, 2007 WL 625713, at *3 (CA10 Mar. 2, 2007); Dahler v. United States, 473 F.3d 769, 771-72 (CA7 2007); Andrews v. United States, 441 F.3d 220, 222-28 (CA4 2006). Three of those five decisions yielded interlocutory judgments,[5] and this case is the only one in which a petition for a writ of certiorari has been filed. Additionally, until the petition in this case was filed, the Court's review of the question presented had not been sought in over three years, despite the question's recurring nature. See Bramwell v. Bureau of Prisons, 543 U.S. 811 (2004) (No. 03-1519) (pet. filed May 5, 2004). Finally, because the issue recurs most frequently in cases brought by pro se prisoners who often lack legal training and resources, there is no guarantee that the relevant legal arguments will be properly preserved in the court of appeals[6] or that the issue will be properly presented in a petition for a writ of certiorari.[7]

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with citation to settled circuit precedent, which would indicate to the losing parties that seeking appellate review would likely be futile.

[5] See Pet. App. 1a-7a; Dahler, supra; Andrews, supra.

[6] For example, in the presently-pending Second Circuit case, the "plaintiff does not address the question at issue in this case: whether 28 U.S.C. § 2680(c) applies to detentions of goods by all law enforcement officers and

In sum, if past is prologue, it may be three more years - despite the recurring nature of the question presented - before the question is presented to the Court in a non-interlocutory petition prepared by counsel. While it is debatable whether three years qualifies as "short order," three years is too long to leave the important, recurring, and divisive question unresolved by this Court - particularly since the interlocutory posture of this case presents no obstacle to the question's resolution.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

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thus deprives the district court of jurisdiction over plaintiff's claims." U.S. Br. at 39, ABC v. DEF, No. 06-1362 (CA2 filed Nov. 3, 2006).

[7] As noted in the petition, this Court denied review of the question presented a total of seven times in 2003 and 2004. See Rigsby v. United States, 543 U.S. 955 (2004) (No. 03-11038) (pet. filed April 22, 2004); Corbeil v. United States, 543 U.S. 822 (2004) (No. 03-9719) (pet. filed Apr. 2, 2004); Bramwell, supra; Conrod v. Moore, 542 U.S. 905 (2004) (No. 03-8804) (pet. filed Jan. 9, 2004); Greer v. United States, 541 U.S. 1087 (2004) (No. 03-9002) (pet. filed Dec. 29, 2003); Ames v. Pontesso, 538 U.S. 1058 (2003) (No. 02-8538) (pet. filed Dec. 16, 2002); Miller v. United States, 538 U.S. 1036 (2003) (No. 02-8505) (pet. filed Jan. 14, 2003). Of those seven cases, only the petition in Bramwell was filed by counsel.

Respectfully submitted.

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